IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 27489-6-III**
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
STEPHEN ANTHONY BAILEY,	)	**UNPUBLISHED OPINION**
	)	
Appellant.	)	
	)	

Kulik, C.J. — Stephen Bailey appeals his convictions for first degree assault and intimidating a witness. Mr. Bailey asserts that the court made various erroneous trial court rulings, conducted an unfair trial, and allowed inadmissible expert testimony. He also contends that there was insufficient evidence to convict him. We affirm the convictions and Mr. Bailey's sentence as a persistent offender.

FACTS

On March 5, 2007, Genevieve Oshiro reported to police a fight between her grandson, Stephen Bailey, and his girlfriend, Rosalinda Botello. Officer Michael Durbin arrived at Ms. Oshiro's home a "matter of seconds" after the 911 call, accompanied by

Sergeant (then Officer) Henne. V Report of Proceedings (RP) at 810. Officer Durbin observed Mr. Bailey on the floor of the room, with both of his hands around Ms. Botello's neck. Officer Durbin immediately ordered Mr. Bailey to let Ms. Botello go. Mr. Bailey kept her in the chokehold and pulled her on top of him. Officer Durbin shot Mr. Bailey in the thigh with his taser gun. Mr. Bailey's grip loosened and Sergeant Henne pulled Ms. Botello away.

Officer Ryan Urlacher arrived shortly after Officer Durbin and Sergeant Henne. He entered the apartment and heard Officer Durbin ordering Mr. Bailey to release Ms. Botello. Officer Urlacher saw Mr. Bailey holding Ms. Botello in a chokehold, with one hand covering her nose and mouth. Ms. Botello was crying. Officer Urlacher also ordered Mr. Bailey to release Ms. Botello. As soon as Mr. Bailey released Ms. Botello, she ran out of the room. Officer Urlacher arrested Mr. Bailey and read him his *Miranda*[1] rights. Mr. Bailey received medical attention for the taser probes and a head injury he suffered from hitting his head on a bicycle pedal following the tasing. Officer Urlacher did not recall seeing any injuries on Ms. Botello.

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Sergeant Henne interviewed Ms. Botello and used a COBAN[2] video/audio recorder to record the interview. Sergeant Henne did not testify at trial, but portions of the interview were introduced during trial. Ms. Botello told Sergeant Henne that Mr. Bailey had been drinking that night. She explained that Mr. Bailey was holding her "accountable"[3] for a fight with Red (her sister's boyfriend) and his friends. She stated that Mr. Bailey grabbed her around her face and neck and dragged her. At times during the attack, she could not breathe.

The State charged Mr. Bailey with first degree assault—domestic violence, or alternatively, second degree assault—domestic violence, and intimidating a witness, or alternatively, tampering with a witness.

Prior to trial, the trial court excluded references to Mr. Bailey's tattoos, gang affiliations, and drug usage. The court admitted, under ER 404(b), letters Mr. Bailey had written to Ms. Botello from jail following his arrest, as well as recordings of their telephone calls. Under the excited utterance hearsay exception, the court allowed testimony from three community corrections officers (CCOs) regarding statements Ms. Botello made to them in June 2007 about the choking assault.

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[2] COBAN is a camera system set up in the patrol vehicles to document a normal day of patrol.

[3] IV RP at 643.

Several of the admitted letters contained threats to Ms. Botello's family. Mr. Bailey suggested that Ms. Botello change her story about the assault and notify the prosecutor. One letter contained a "example" letter for her to write. IV RP at 619. Ms. Botello stated that in his letters, Mr. Bailey was only giving her examples of what to write, and that the letters did not encourage her to change the truth. In one letter, Mr. Bailey suggested that Ms. Botello write "Steven never injured me in anyway. . . . Write this or something very simular [sic]." Ex. 2. She testified that she was not threatened or scared by the letters. Ultimately, Ms. Botello did write a letter to the prosecutor in which she said Mr. Bailey did not hurt her and she made up the story about him assaulting her.

At trial, Ms. Botello recanted her story, testifying that Mr. Bailey did not have his hands around her neck and he was not trying to prevent her from breathing; instead, he was holding her to calm her down. She testified that she had been using drugs and was upset with Mr. Bailey so she made a false statement to the police in order to send Mr. Bailey to jail.

CCO Cary Steiner testified that Ms. Botello came into his office, upset and crying, on June 18, 2007, and told him Mr. Bailey had hit her. He testified that she also told him about the choking assault and said she told him "[s]he was in a chokehold and feared for her life." V RP at 768.

At the beginning of his testimony, Officer Urlacher identified Mr. Bailey based on his clothing and "the teardrop tattoo next to his left eye." V RP at 905. Mr. Bailey objected, and the court instructed the jury to disregard the statement.

Over Mr. Bailey's objection, the court allowed Dr. Daniel Selove, a forensic pathologist, to testify as an expert witness for the State. He described what would cause a loss of consciousness during strangulation, the different ways a person can be strangled, the physical processes in the body that are affected by strangulation, and what could occur as a result of strangulation. Dr. Selove testified that while external marks or injuries are likely to be present following manual strangulation, it is possible for there to be no injuries.

The jury found Mr. Bailey guilty of first degree assault and intimidating a witness. At sentencing, the State asserted Mr. Bailey was a persistent offender and produced evidence of two prior strike convictions: a jury trial conviction for third degree rape in 2003 and a guilty plea conviction to second degree robbery in 1998. Mr. Bailey was 16 years old at the time of the second degree robbery offense.

The court concluded that Mr. Bailey was a persistent offender and sentenced him to life without the possibility of parole for his first degree assault conviction and 75 months for intimidating a witness. Mr. Bailey appeals.

ANALYSIS

Sufficiency of the Evidence – First Degree Assault

"The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Id.* "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Id.* Credibility determinations are for the trier of fact and are not reviewable on appeal. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

"A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm . . . [a]ssaults another . . . by any force or means likely to produce great bodily harm or death." RCW 9A.36.011(1)(a). "Great bodily harm" is defined as "bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ." RCW 9A.04.110(4)(c).

Mr. Bailey asserts there is no evidence that he intended to inflict great bodily harm. "A person acts with intent or intentionally when he acts with the objective or

purpose to accomplish a result which constitutes a crime." Former RCW 9A.08.010(1)(a) (1975). "'Evidence of intent . . . is to be gathered from all of the circumstances of the case, including not only the manner and act of inflicting the wound, but also the nature of the prior relationship and any previous threats.'" *State v. Ferreira*, 69 Wn. App. 465, 468-69, 850 P.2d 541 (1993) (quoting *State v. Woo Won Choi*, 55 Wn. App. 895, 906, 781 P.2d 505 (1989)).

Ms. Botello told Sergeant Henne that Mr. Bailey was upset with her after a fight with her sister's boyfriend and friends, and that Mr. Bailey was holding her "accountable" for that fight. She also stated that Mr. Bailey grabbed her by the neck and face and that sometimes she could not breathe. The recorded interview contained Ms. Botello's statement that "if the cops come he threatened to kill me." IV RP at 648.

Officer Durbin saw Mr. Bailey with both hands around Ms. Botello's neck and Mr. Bailey did not comply with a command to let Ms. Botello go, but instead, pulled her on top of him and kept her in the chokehold. Officer Durbin also testified that Mr. Bailey turned Ms. Botello so the officers could not grab her, and that Mr. Bailey only loosened his grip on Ms. Botello, but still did not fully release her until he was tasered.

Dr. Selove testified that sustained and sufficiently strong pressure to the neck can cause permanent brain damage or brain death by preventing oxygen from being supplied to the brain.

Credibility determinations are for the trier of fact. We view the evidence in the light most favorable to the State. Here, the circumstances surrounding the assault support the inference that Mr. Bailey intended to inflict great bodily harm upon Ms. Botello. The State presented sufficient evidence to support Mr. Bailey's first degree assault conviction.

Sufficiency of the Evidence – Intimidating a Witness

"A person is guilty of intimidating a witness if a person, by use of a threat against a current or prospective witness, attempts to . . . [i]nfluence the testimony of that person." RCW 9A.72.110(1)(a). "Threat" is defined as "communicat[ing], directly or indirectly, the intent immediately to use force against any person who is present at the time or . . . as defined in RCW 9A.04.110(25)." RCW 9A.72.110(3)(a)(i), (ii). Former RCW 9A.04.110(25) (1988)[4] defines "threat" as "communicat[ing], directly or indirectly the intent . . . [t]o cause bodily injury in the future to the person threatened or to any other person."

[4] RCW 9A.04.110(25) was recodified as RCW 9A.04.110(26) per the Laws of 2005, ch. 458, § 3. It was then recodified from (26) to (27) per the Laws of 2007, ch. 79, § 3.

Mr. Bailey first contends that the only evidence of a threat came from a letter he wrote to Ms. Botello in which he threatened her family if they continued to interfere in his relationship with Ms. Botello. In the letter, Mr. Bailey wrote:

> Ive got a message for you that I know you wont want to here but you need to princess, cause your sister is making our relationship very complicated I dont ever want to see her or Red again. Ever. Me and Red will keep on fightin. I dont care. . . . [F]or now Rosa, I think you should tell Marisol to leave you alone so we can fix our relationship. *If I ever see your sister Im gonna knock her out* and if Red or her go to my grandmas trippen again? *I will take a plea for as little time as possible and fucken kill them* [Marisol and her boyfriend Red] *both*. . . . And you tell them both I said this Rosa. I dont care. If you want us to last? You keep them the fuck out [of] our relationship & away from my family or I will.
> . . . .
> You need to choose. Family is family. We will always have that. . . . They can be a part of it if they wish. A possitive part. But they cannot control it or continue to make it worse. We cant lose our familys but we can lose each other. *What happend that night will never happen again. You will never snitch on me again. And nobody will ever try to jump*[5] *me for your family without gettin hurt. I wont hold back any more next time somebody dies*. I must protect myself and my family.[6]

Ex. 9.

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[5] Mr. Bailey is referring to an incident that occurred prior to his assault of Ms. Botello at Mr. Bailey's grandmother's apartment complex. Mr. Bailey was injured when a group of Red's friends arrived and a physical altercation ensued.

[6] The italicized portions of these passages are the two threats the State referenced during pretrial hearings to support its argument that this letter should be admitted into evidence.

The quoted language is threatening. The statutory language in former RCW 9A.04.110(25)(a) states that a threat is a communication of the intent to cause bodily injury to the person threatened or any other person. Here, Mr. Bailey communicated an intent to cause bodily injury to other people, consistent with the statutory definition of "threat."

Likewise, "the statute requires that the defendant use a threat in an 'attempt'" to influence the testimony of a witness. *State v. Boiko*, 131 Wn. App. 595, 601, 128 P.3d 143 (2006). These threats, read in the context of the letter as a whole, show that Mr. Bailey threatened Ms. Botello's family. And the threats are related to Ms. Botello changing her testimony.

Next, the State relied on the sample letter Mr. Bailey sent to Ms. Botello making suggestions as to what Ms. Botello should write to the prosecutor concerning the intimidating a witness charge. This letter was a sample of what he wanted Ms. Botello to write and give to the police, recanting her story about the night he choked her. In other letters, Mr. Bailey tells Ms. Botello that she needs to tell the prosecutor she lied and Mr. Bailey was not choking her, if they want to be able to be together.

When viewed in a light most favorable to the State, substantial evidence supports Mr. Bailey's conviction for intimidating a witness.

Juvenile Conviction

This court reviews de novo "a sentencing court's decision to consider a prior conviction as a strike." *State v. Thiefault*, 160 Wn.2d 409, 414, 158 P.3d 580 (2007).

The Persistent Offender Accountability Act (POAA) requires a trial court to sentence a persistent offender to life in prison without the possibility of release. RCW 9.94A.555, .570. "A 'persistent offender' is a person who has been convicted in Washington of a felony classified as a 'most serious offense'[7] and, prior to committing this offense, had been convicted of at least two felonies in Washington . . . that would be included in the offender score." *State v. Birch*, 151 Wn. App. 504, 516, 213 P.3d 63 (2009). An "offender" includes persons who commit a felony under the age of 18 if they were properly transferred to the adult court by the juvenile court under RCW 13.40.110. Former RCW 9.94A.030(31) (2006). The State must prove a prior conviction by a preponderance of the evidence to use that conviction as a strike offense under the POAA. *State v. Knippling*, 166 Wn.2d 93, 100, 206 P.3d 332 (2009) (quoting *In re Pers. Restraint of Cadwallader*, 155 Wn.2d 867, 876, 123 P.3d 456 (2005)).

[7] A "most serious offense" is defined as any class A felony, or any other enumerated felony, including third degree rape, and second degree robbery. Former RCW 9.94A.030(29)(a), (n), (o) (2006).

Mr. Bailey contends that the State did not meet its burden of showing that he was a persistent offender because it failed to show the adult court had jurisdiction when he pleaded guilty to second degree robbery at the age of 16.[8]

The juvenile court has exclusive original jurisdiction over all proceedings involving juveniles. RCW 13.04.030(1). The superior court automatically assumes jurisdiction over a juvenile offender if the juvenile is charged with first degree robbery and is 16 or 17 years old on the date of the charged offense. RCW 13.04.030(1)(e)(v)(C). The superior court also assumes jurisdiction if the juvenile court transfers jurisdiction pursuant to RCW 13.40.110. RCW 13.04.030(1)(e)(i).

Under RCW 13.40.110(1), either party or the court can request that the court transfer the respondent to adult court. The juvenile court must hold a declination hearing unless the hearing is waived by the court, the parties and their counsel. Former RCW 13.40.110(1) (1997).

The State charged Mr. Bailey with first degree robbery when he was 16. Mr. Bailey later signed an "Agreement Regarding Waiver of Declination Proceeding," in which he agreed to be tried for second degree robbery in adult court. Ex. B. He also waived "any and all rights under RCW 13.40.110 (or any other applicable statute) to

[8] Mr. Bailey does not challenge the use of his 2003 third degree rape conviction in the persistent offender finding.

declination hearing." Ex. B. He entered an *Alford*[9] plea to a charge of second degree robbery on the same day.

Unlike first degree robbery, second degree robbery is not an automatic decline offense. *See* RCW 13.04.030(1)(e)(v). The adult court automatically had jurisdiction when the State charged Mr. Bailey with first degree robbery. *See* RCW 13.04.030(1)(e)(v)(C). The juvenile court regained jurisdiction when the charge was reduced to second degree robbery, requiring it to hold a declination hearing for adult court to have jurisdiction over Mr. Bailey. *See Knippling*, 166 Wn.2d at 100. However, the juvenile court did not hold a declination hearing because Mr. Bailey waived his right to a hearing.

Mr. Bailey asserts that his waiver was ineffective because it was not made knowingly, intelligently, or voluntarily, as required under RCW 13.40.140.

The colloquy between the court and Mr. Bailey proceeded as follows:

> THE COURT: All right. Do you know what declination is?
> THE DEFENDANT: Going to prison.
> THE COURT: I'm sorry?
> THE DEFENDANT: Getting sent to prison.
> THE COURT: Well, it means—you're 16 now, is that right?
> THE DEFENDANT: Yeah.
> THE COURT: Juvenile court has jurisdiction over you. You are in adult court right now because you were originally charged with a Class A felony, first-degree robbery. The state is reducing the charge to second-

[9] *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

> degree robbery.
>
> So, technically, you could go back to juvenile court. But part of the agreement is that you won't go back, and you are going to be treated as an adult here. And you are giving up the right to have a hearing to determine whether you should remain in juvenile court. Do you understand that?
>
> THE DEFENDANT: Yeah.
>
> THE COURT: Are you sure?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Are you agreeing to that?
>
> THE DEFENDANT: Yes.

Ex. E at 1-2.

> THE COURT: Do you also understand it doesn't matter how you entered this plea, once you enter it and I find you guilty, you're convicted, it goes on your record?
>
> THE DEFENDANT: Yes.
>
> THE COURT: It is a very serious offense, do you understand that?
>
> THE DEFENDANT: That means I'll have a felony, one strike.
>
> THE COURT: It is a strike, you bet it is.
>
> THE DEFENDANT: Yeah.
>
> THE COURT: So it's very serious. You're 16. You will have a strike on your record already.

Ex. E. at 6.

Additionally, in his *Alford* plea, Mr. Bailey initialed next to the subparagraph stating that his crime was a "*most serious offense*" and that two more convictions for most serious offenses would result in a mandatory sentence of life in prison without the possibility of parole. Ex. F at 2.

At the sentencing hearing on the convictions before us here, Mr. Bailey testified

that he did not know the difference between a general felony and a strike level offense, no one explained to him that the three strikes consequences applied to him even though he was a juvenile, he confused felonies with strikes and offender scores, and he did not know his guilty plea could someday be used to give him a life sentence. However, under the preponderance of the evidence standard, the record shows that Mr. Bailey waived his right to a declination hearing intelligently and after having been fully informed about the rights he was waiving. *See* RCW 13.40.140(9). Sufficient evidence showed that the adult court had jurisdiction, and Mr. Bailey's second degree robbery conviction constituted a prior most serious offense conviction.

ER 404(b) Evidence

This court reviews a trial court's admission or exclusion of evidence for an abuse of discretion. *State v. Pirtle*, 127 Wn.2d 628, 648, 904 P.2d 245 (1995). A trial court abuses its discretion when its decision is based on manifestly unreasonable or untenable grounds. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Evidence of prior bad acts is presumed to be inadmissible. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). However, prior bad acts can be admissible if they show motive, intent, or knowledge. ER 404(b). Prior bad acts evidence must serve a legitimate purpose, be relevant to show an element of the crime charged, and the

probative value of the evidence must outweigh its prejudicial effect. *State v. Magers*, 164 Wn.2d 174, 184, 189 P.3d 126 (2008).

Unchallenged findings of fact are verities on appeal. *State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003). This court reviews the trial court's conclusions of law to determine if they are supported by the findings of fact. *Hegwine v. Longview Fibre Co., Inc.*, 132 Wn. App. 546, 555, 132 P.3d 789 (2006), *aff'd*, 162 Wn.2d 340, 172 P.3d 688 (2007).

> The trial court entered a conclusion of law that the letters and telephone calls were
>
> relevant to explain the dynamics of their relationship (the abuse, threats and controlling behavior by the defendant), why the victim would recant about the assault on March 5, 2007 incident [sic], to prove or show motive, intent, reasonableness of fear by the victim or members of the victim's family, and [Mr. Bailey's] consciousness of guilt.

CP at 24-25. Mr. Bailey asserts the letters and telephone calls were inadmissible as prior bad acts.

The trial court found that Mr. Bailey wrote a letter threatening to harm Ms. Botello's family. Mr. Bailey also wrote a sample letter for Ms. Botello to send to the police recanting her story. Mr. Bailey wrote a number of letters and made a number of telephone calls where he commanded Ms. Botello to do certain things. In the telephone calls, Mr. Bailey's anger showed when Ms. Botello did not follow his orders. Mr. Bailey

does not challenge any of these findings of fact. The findings support the trial court's conclusion that the letters and telephone calls are relevant to show the dynamics of the relationship, why Ms. Botello would recant her story, and to show motive, intent, Ms. Botello's reasonable fear, and Mr. Bailey's consciousness of guilt.

The trial court's findings of fact support its conclusions of law and show a legitimate purpose for admitting the evidence. The threats and the sample letter are relevant to prove elements of intimidating a witness. Finally, the court carefully weighed the probative value of the evidence against its prejudicial effects. The trial court did not abuse its discretion by admitting the letters and telephone calls.

Excited Utterance

A trial court's decision to admit a hearsay statement as an excited utterance is reviewed for an abuse of discretion. *State v. Ohlson*, 162 Wn.2d 1, 7-8, 168 P.3d 1273 (2007). The trial court's decision will not be reversed "unless [this court] believe[s] that no reasonable judge would have made the same ruling." *State v. Woods*, 143 Wn.2d 561, 595-96, 23 P.3d 1046 (2001).

An excited utterance is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." ER 803(a)(2). A hearsay statement is admissible as an excited utterance if

(1) a startling event or condition occurred, (2) the statement was made while the declarant was under the stress of excitement caused by the event or condition, and (3) the statement relates to the event or condition. *Woods*, 143 Wn.2d at 597.

Here, the trial court allowed the CCOs to testify as to statements Ms. Botello made to them under the excited utterance exception to the hearsay rule. CCO Cary Steiner testified that on June 18, 2007, Ms. Botello came into the office and told him that she had found Mr. Bailey with another woman, and that after the three of them argued, Mr. Bailey convinced her to get into a car with them. Ms. Botello told CCO Steiner that Mr. Bailey hit her in the neck, and she got out of the car to ensure her safety. Ms. Botello informed CCO Steiner of multiple prior assaults, including the assault in question here. CCO Steiner testified that Ms. Botello told him "[s]he was in a chokehold and feared for her life." V RP at 768.

Mr. Bailey contends that the excited utterance exception does not apply to Ms. Botello's statements regarding the choking assault because those statements did not relate to the startling event—the alleged assault in the car. The statement must relate to the event which causes the excitement. *Woods*, 143 Wn.2d at 597. Because statements about the choking assault do not relate to the alleged assault in the car, the court erred by admitting Ms. Botello's statements regarding the choking assault under the excited

utterance exception.

Reversal is required if a trial court error affects a constitutional right or the error was prejudicial. *State v. Ramires*, 109 Wn. App. 749, 760, 37 P.3d 343 (2002). Error is not prejudicial unless, within reasonable probabilities, the error affected the outcome of the trial. *State v. Dixon*, 37 Wn. App. 867, 875, 684 P.2d 725 (1984). "In assessing whether the error was harmless, [this] court should measure the admissible evidence of guilt against the prejudice caused by the inadmissible testimony." *Ramires*, 109 Wn. App. at 760.

Here, even though the court erred by admitting hearsay testimony, the testimony did not prejudice the outcome of the trial. First, substantial evidence existed without the CCO's testimony—by way of the letters and telephone calls—as ER 404(b) evidence of the relationship's dynamics and Mr. Bailey's motive and intent during the choking assault. Second, even if the hearsay testimony regarding the choking assault was inadmissible, sufficient admissible evidence exists in the record to support Mr. Bailey's first degree assault conviction. Accordingly, admission of the hearsay testimony constituted harmless error because it is highly probable that the jury would have convicted Mr. Bailey without it.

Witness Statements

This court reviews a trial court's decision to grant or deny a mistrial for an abuse of discretion. *State v. Weber*, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983).

"A trial court should grant a mistrial when an irregularity in the trial proceedings is so prejudicial that it deprives the defendant of a fair trial." *State v. Babcock*, 145 Wn. App. 157, 163, 185 P.3d 1213 (2008). To determine whether the defendant was denied a fair trial, this court examines the following factors:

> (1) the seriousness of the irregularity; (2) whether challenged evidence was cumulative of other evidence properly admitted; and (3) whether the irregularity could be cured by an instruction to disregard the remark, an instruction which a jury is presumed to follow.

Id.

The testimony the appellant claims required a mistrial must be examined "against the backdrop of all the evidence." *State v. Escalona*, 49 Wn. App. 251, 254, 742 P.2d 190 (1987).

Mr. Bailey moved for a mistrial based on three trial irregularities: (1) multiple references to Mr. Bailey's incarceration in jail or prison, (2) Officer Urlacher's reference to a purported teardrop tattoo next to Mr. Bailey's eye, and (3) alleged misconduct by the prosecutor during cross-examination of Ms. Oshiro. Mr. Bailey contends the trial court erred by denying a mistrial because the irregularities were so prejudicial that they denied him a fair trial.

References to Jail and Prison. In *State v. Condon*, 72 Wn. App. 638, 865 P.2d 521 (1993), the Court of Appeals upheld the trial court's denial of a motion for mistrial based on a witness making statements about the defendant being in jail. The Court of Appeals held that the fact a defendant has been in jail does not indicate a propensity to commit a similar crime nor does it necessarily mean the defendant has been convicted of a crime. The court further held that "although the remarks may have had the potential for prejudice, they were not so serious as to warrant a mistrial, and the court's instructions to disregard the statements were sufficient to alleviate any prejudice that may have resulted." *Id.* at 649-50.

Here, Maria Som, Ms. Botello's mother, twice mentioned Mr. Bailey had been in jail. Mr. Bailey did not object to her statements when they were made, or request a curative instruction. He objected to the statements only when he moved for a mistrial after the defense rested. "When error may be obviated by an instruction to the jury, the error is waived unless an instruction is requested." *State v. Ramirez*, 62 Wn. App. 301, 305, 814 P.2d 227 (1991). A curative instruction would have alleviated the prejudicial effect of the statements, but because Mr. Bailey failed to request an instruction, he waived the ability to move for a mistrial on these grounds. *See Condon*, 72 Wn. App. at 649-50.

Ms. Botello testified that she and Mr. Bailey began dating in person after he was released from prison. Mr. Bailey objected and moved for a mistrial, but did not request a curative instruction. A reference to a defendant in prison may be more prejudicial than references to jail. Nevertheless, substantial evidence existed to convict Mr. Bailey of first degree assault and any prejudicial effect the prison reference may have had would have been removed by a curative instruction. *See id.* Moreover, the cumulative effect of all references to jail and prison did not justify a mistrial in light of the substantial evidence supporting the first degree assault conviction. Accordingly, the court did not err by denying Mr. Bailey's motion for a mistrial based on these grounds.

Reference to a "Teardrop" Tattoo. "When evidence is likely to stimulate an emotional response rather than a rational decision, a danger of unfair prejudice exists." *State v. Powell*, 126 Wn.2d 244, 264, 893 P.2d 615 (1995). In a pretrial ruling, the court excluded any mention of Mr. Bailey's tattoos; however, Officer Urlacher pointed out what he thought to be a teardrop tattoo next to Mr. Bailey's eye.

Mr. Bailey contends that it is "commonly known, and certainly readily available by a quick web-search" that teardrop tattoos signify that that person has killed another person, often times in prison. Appellant's Br. at 44. There is nothing in the record, however, demonstrating that the jurors had any knowledge regarding the significance of a

teardrop tattoo. Moreover, there was no further mention of the tattoo. And there is nothing in the record even hinting that Mr. Bailey may have killed someone.

Perhaps it may have been questionable for Officer Urlacher to bring attention to the tattoo, but his was the only reference to it and the significance of the tattoo was never mentioned during trial. As such, the court's immediate curative instruction to disregard the statement cured the irregularity. *See State v. Babcock*, 145 Wn. App. 157, 163, 185 P.3d 1213 (2008). The court did not err by denying Mr. Bailey's motion for a mistrial on this basis.

Prosecutorial Misconduct in Cross-Examination. "'A person being tried on a criminal charge can be convicted only by evidence, not by innuendo.'" *State v. Miles*, 139 Wn. App. 879, 886, 162 P.3d 1169 (2007) (quoting *State v. Yoakum*, 37 Wn.2d 137, 144, 222 P.2d 181 (1950)). When a prosecutor's questions imply the existence of a prejudicial fact, the prosecutor must be able to prove that fact. *Miles*, 139 Wn. App. at 886. Failure to object to a cross-examination or request a curative instruction does not constitute a waiver because until the State rests its rebuttal case, the defendant has "no way of knowing whether the State would or would not prove the prior statements." *State v. Babich*, 68 Wn. App. 438, 446, 842 P.2d 1053 (1993).

Here, on cross-examination, the prosecutor asked Ms. Oshiro, "Do you remember

your grandson telling you he would have killed Rosalinda?" VII RP at 1136. Mr. Bailey objected asserting the court should grant a mistrial because by holding a document while questioning Ms. Oshiro, the prosecutor implied that he had a prior statement from Ms. Oshiro in which she stated Mr. Bailey said he would have killed Ms. Botello. Mr. Bailey also contends there was no foundation for the question.

It is unclear from the record whether or not the prosecutor referred to a document when questioning Ms. Oshiro. Even though the prosecutor stated it was only a question, the question seemed to be based on extrinsic evidence that was never introduced or proved. *See Miles*, 139 Wn. App. at 886.

Mr. Bailey's attorney rehabilitated Ms. Oshiro on redirect. When defense counsel asked if Mr. Bailey ever said to her he was going to kill Ms. Botello, or if such a conversation was "even remotely possible," Ms. Oshiro answered "No." VII RP at 1142. Mr. Bailey declined a curative instruction and such rehabilitation likely cured the prejudicial effect of the question in the same way a curative instruction would have.

Finally, substantial evidence in the record supports the first degree assault conviction. The trial court did not err by denying a mistrial.

Jury Instruction Regarding Third Strike Conviction

This court reviews de novo a trial court's refusal to give a requested instruction based on a question of law. *State v. Lucky*, 128 Wn.2d 727, 731, 912 P.2d 483 (1996), *overruled on other grounds by State v. Berlin*, 133 Wn.2d 541, 947 P.2d 700 (1997).

"'[I]t is well established that when a jury has no sentencing function, it should be admonished to "reach its verdict without regard to what sentence might be imposed."'" *State v. Townsend*, 142 Wn.2d 838, 846, 15 P.3d 145 (2001) (quoting *Shannon v. United States*, 512 U.S. 573, 579, 114 S. Ct. 2419, 129 L. Ed. 2d 459 (1994)). A jury may consider the sentencing only in capital cases. *Townsend*, 142 Wn.2d at 846.

Here, the trial court declined to inform the jury about the possibility of a life sentence for Mr. Bailey if convicted of first or second degree assault. Mr. Bailey acknowledges the "well established" rule, but argues that in light of *State v. Mason*, 160 Wn.2d 910, 162 P.3d 396 (2007), the jury should have been informed that a guilty verdict on the first or second degree assault charges would result in a life sentence because of the three strikes rule. Appellant's Br. at 47-48. In *Mason*, the Supreme Court reiterated its holding in *Townsend*. *Id.* at 929-30. However, in dicta, it invited attorneys to challenge its reasoning in *Townsend*, stating that "upon a proper record," if "there are legitimate strategic and tactical reasons why informing a jury about issues of punishment would advance the interest of justice and provide a more fair trial, then counsel should zealously

advance the arguments." *Id.* at 930.

While Mr. Bailey's trial counsel "zealously advance[d]" the argument that the jury should be informed of Mr. Bailey's possible life sentence, both he and counsel on appeal fail to demonstrate any "strategic and tactical reasons" why the court should have given such an instruction. Moreover, this court is "duty-bound to apply" a "valid statement of Washington law as pronounced by our Supreme Court." *Green v. Normandy Park Riviera Section Cmty. Club, Inc.*, 137 Wn. App. 665, 691-92, 151 P.3d 1038 (2007). That "valid statement of Washington law" comes from *Townsend*, and because this is not a capital case, the court properly declined to instruct the jury about the possibility of a life sentence for Mr. Bailey.

Expert Witness Testimony

This court reviews a trial court's decision to admit expert testimony under ER 702 and ER 703 for an abuse of discretion. *State v. Roberts*, 142 Wn.2d 471, 520, 14 P.3d 713 (2000).

Under ER 702, "expert testimony is admissible . . . where (1) the witness qualifies as an expert and (2) the expert's testimony would be helpful to the trier of fact." *In re Det. of Pouncy*, 144 Wn. App. 609, 624, 184 P.3d 651 (2008), *aff'd*, 168 Wn.2d 382, 229 P.3d 678 (2010). Expert testimony is helpful to the trier of fact "if it concerns matters

beyond the common knowledge of the average layperson and does not mislead the jury." *State v. Thomas*, 123 Wn. App. 771, 778, 98 P.3d 1258 (2004).

Mr. Bailey contends that Dr. Selove's testimony was cumulative and that suffocation by strangulation is a concept within the common knowledge of the jury. While the average juror likely understands that strangulation could lead to death, Dr. Selove described the processes affected by strangulation and the necessary components of strangulation required to cause brain damage or death. He stated that it was possible to strangle a person without leaving any visible marks on a person's neck, as was the case with Ms. Botello. He further testified that if a person is released from strangulation for even a few seconds, the strangulation would have to begin all over again before a lack of oxygen would have an effect on the brain. Such testimony was not cumulative and was most likely beyond the knowledge of a common juror.

Mr. Bailey also contends that Dr. Selove's testimony was damaging because he opined as to whether Mr. Bailey's hold on Ms. Botello could have been lethal. However, Mr. Bailey fails to show where in the record Dr. Selove offered such testimony. Dr. Selove's testimony was relevant as to whether Mr. Bailey committed first degree assault and was not prejudicial. Mr. Bailey has failed to show that the trial court abused its discretion by allowing Dr. Selove to testify.

STATEMENT OF ADDITIONAL GROUNDS

A. In his statement of additional grounds for review, Mr. Bailey raises numerous issues for the first time on appeal (malicious prosecution, absence of Sergeant Henne, attempted murder argument, hearsay, and prosecutorial misconduct). Because these issues do not rise to the level of manifest constitutional error, this court will not consider them. *See* RAP 2.5(a).

B. Mr. Bailey also contends he was sentenced to 10 years for intimidating a witness. A 10-year sentence is listed in his judgment and sentence as the maximum sentence. Mr. Bailey was sentenced to 75 months, which is the high end of the standard range.

C. Mr. Bailey next contends that Stephen and Maria Som should not have been allowed to testify until after Ms. Botello because of the court's prior ruling regarding impeachment and ER 404(b) witnesses. The court ruled it would allow the Soms to testify so long as the foundation was properly laid prior to any testimony offered under the excited utterance hearsay exception. Neither of the Soms, however, testified as to any hearsay statements made by Ms. Botello. Moreover, the court did not limit the Soms to testifying for impeachment purposes only. Accordingly, the court's pretrial rulings were not implicated.

D. Mr. Bailey's contentions that the trial court erred by not upholding its pretrial rulings regarding references to his tattoos, time in jail and prison, witnesses, and hearsay testimony were addressed above. Additionally, this court will not address the references to no contact orders because Mr. Bailey fails to show how such references prejudiced him. *See State v. Davis*, 141 Wn.2d 798, 870 n.388, 10 P.3d 977 (2000).

E. Mr. Bailey contends the use of a prop mannequin denied him a fair trial because it did not accurately portray the assault. Mr. Bailey's defense counsel, however, used the mannequin while cross-examining Officer Durbin. Under the invited error doctrine, a party is prohibited from contributing to "an error at trial and then complaining of it on appeal." *State v. Pam*, 101 Wn.2d 507, 511, 680 P.2d 762 (1984), *overruled on other grounds in State v. Olson*, 126 Wn.2d 315, 893 P.2d 629 (1995). Accordingly, this court will not consider the issue because even if use of the mannequin constituted error, Mr. Bailey contributed to that error. *See id.*

F. Mr. Bailey contends that the telephone calls had no probative value. He cites to a settlement agreement in *Dudek v. Blair,* case #C-76-226-RJM. However, this case reference does not exist as cited and WAC 289-24-200 and -210 cited by Mr. Bailey were repealed in 2006.

G. Mr. Bailey's contentions regarding prosecutorial misconduct have no merit

because the statements he refers to either do not appear on the pages he cites to, were made outside the presence of the jury, or simply summarized testimony or evidence from trial.

H. Mr. Bailey further asserts that he was prejudiced by (1) the admission of letters that Ms. Botello had not received, (2) the admission of photograph #27 that shows the "13"[10] tattoo next to Mr. Bailey's eye, and (3) the reference to the no-contact order by the prosecutor. This court will not address these issues because Mr. Bailey fails to show prejudice. *See Davis*, 141 Wn.2d at 870 n.388.

I. Mr. Bailey contends the prosecutor argued facts not in evidence during pretrial hearings. Because Mr. Bailey fails to cite to support in the record, this court will not review his contention. *See* RAP 10.10(c).

J. This court cannot address Mr. Bailey's contention that the prosecutor committed misconduct regarding "redness of [Ms. Botello's] neck"[11] because he fails to make any argument about this alleged statement.

[10] Statement of Additional Grounds at 4.
[11] Statement of Additional Grounds at 4.

K. Mr. Bailey alleges prosecutorial misconduct because there is no evidence that he and Ms. Botello broke up and he "came running back." Statement of Additional Grounds at 4. Mr. Bailey fails to show how any such statement constituted misconduct or prejudiced him.

Conclusion

We affirm the convictions for first degree assault and intimidation of a witness, and Mr. Bailey's sentence as a persistent offender.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

_____
Kulik, C.J.

WE CONCUR:

_____ _____
Sweeney, J. Korsmo, J.